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NO. 58176-7-I

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROGER ENGEL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable James Cayce

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR.

1. By allowing the State to present uncross-examined hearsay testimony, the court violated Mr. Engel's right to confrontation under the Sixth Amendment of the United States Constitution.

2. By allowing the State to present uncross-examined hearsay testimony, the court violated Mr. Engel's right to confrontation under the Washington Constitution, Article 1, § 22.

3. Because the State failed to prove that Mr. Engel entered or remained in a building, the evidence was insufficient to convict him of burglary in the second degree.

4. The requirement that Mr. Engel submit a biological sample for DNA identification and analysis violates the Fourth Amendment of the United States Constitution and Article 1, § 7 of the Washington Constitution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The confrontation clause of the Sixth Amendment requires in-person testimony, or a full opportunity for cross-examination where the witness was unavailable, in order to admit out-of-court statements as "testimonial evidence." Here, the

witness did testify at trial but was not asked any questions about his viewing of a video or his identification of Mr. Engel in that video. The prosecutor's paralegal then testified to the witness' identification. Did the admission of these out-of-court statements violate Mr. Engel's right to confrontation? (Assignment of Error 1)

2. The Washington Constitution more broadly protects the right to confrontation than the Sixth Amendment. Does the violation of the State right to confront witnesses "face to face" require reversal? (Assignment of Error 2)

3. To support a conviction for burglary in the second degree, the State had to prove, beyond a reasonable doubt, Mr. Engel entered or remained unlawfully in a building. "Building" is statutorily defined to include any "fenced area." The State alleged Mr. Engel unlawfully entered the yard of the Western Asphalt Company, only one-third of which was enclosed by a fence. Did the resulting burglary conviction violate due process, requiring reversal? (Assignment of Error 3)

4. The Fourth Amendment's requirement that a person's expectations of privacy not be unreasonably disturbed prohibits suspicionless searches conducted primarily for normal crime control activities. RCW 43.43.754 requires suspicionless searches

for the sole purpose of gathering evidence for future prosecution. Are such searches unreasonable under the Fourth Amendment? (Assignment of Error 4)

5. Article 1, § 7 provides greater privacy protections than the Fourth Amendment. Does Article 1, § 7 prohibit suspicionless searches under RCW 43.43.754 for the sole purpose of gathering evidence for future prosecution? (Assignment of Error 4)

C. STATEMENT OF FACTS.

1. Procedural Facts. On September 16, 2005, the Prosecuting Attorney for King County charged Roger Engel with burglary in the second degree. CP 1-3. Following a jury trial before the Honorable James Cayce, Mr. Engel was convicted as charged. CP 32-37. He was sentenced to two months and ordered to provide a DNA sample for biological analysis. CP 32-37.

2. Testimony at Trial.

a. Testimony of Western Asphalt Company Comptroller Yvonne O'Leary. Ms. O'Leary testified that after a number of items were stolen from the premises, Western Asphalt installed a video surveillance system. 3/21/06RP 95-96. A hidden camera was installed near the shop area. 3/21/06RP 98.

On January 13, 2005, Ms. O'Leary went through the surveillance system's event logs and found footage from the hidden camera showing that the night before, two individuals entered the property. 3/21/06RP 100. The business was closed at the time and the individuals did not have permission to be on the premises. 3/21/06RP 110-11. Another theft occurred later that month and was also captured on video. 3/21/06RP 101. Ms. O'Leary asked a consultant to copy both videos onto a CD-ROM and gave it to the police. 3/21/06RP 101.

b. Testimony of Western Asphalt Owner William Peterson. Mr. Peterson testified that his business had been the subject of multiple crimes, including theft and vandalism. 3/21/06RP 122. After installing the surveillance system, he and his staff decided to place some old aluminum tire rims outside a locked shed as "bait" in order to get a close-up video. 3/21/06RP 126. On January 13, 2005, he reviewed footage taken the night before, which showed two individuals taking the tire rims away. 3/21/06RP 127-28. The business was closed at the time and the individuals did not have permission to be on the property. 3/21/06RP 128.

This incident was not reported to the police until some time later, when another theft occurred. 3/21/06RP 158.

c. Testimony of King County Deputy Sheriff William Michaels. Deputy Michaels testified he has known Mr. Engels approximately 15-20 years through various interactions in the small community of Maple Valley, is on a first name basis with him, and has spoken to him 50-60 times. 3/21/06RP 144-46. He also knows Gary Shaw "very well," knows where both Mr. Engel and Mr. Shaw live, and has seen the two men together in the past. 3/21/06RP 146-47.

In March 2005 Detective Johnson asked Deputy Michaels to view a video recorded on a CD-ROM. 3/21/06RP 147. Detective Johnson suggested that one of the men on the video could be Mr. Shaw; Deputy Michaels could not recall whether Detective Johnson also mentioned Mr. Engel's name. 3/21/06RP 152. Deputy Michaels viewed the video and recognized the two men as Mr. Engel and Mr. Shaw. 3/21/06RP 148.

d. Testimony of Gary Shaw. Mr. Shaw testified he knows Mr. Engel through a mutual friend, but has not seen him for a long time. 3/22/06RP 3. When the police contacted Mr. Shaw in late January 2005 to investigate recent crimes at Western Asphalt, he confessed to his involvement in those incidents. 3/22/06RP 5.

Mr. Shaw has been previously convicted of burglary, theft, and possession of stolen property. 3/22/06RP 3. He admitted having "scrapped" in the past, which he defined as procuring metal either legally or illegally and selling it to a scrap yard to be recycled. 3/22/06RP 6-8.

e. Testimony of King County Detective Jeffrey Johnson. Detective Johnson was assigned to investigate a theft at Western Asphalt that occurred on January 26 or 27, 2005. 3/22/06RP 11. At that time, the January 12 burglary was also reported. 3/22/06RP 11, 19. Detective Johnson viewed the video of the January 12 incident and recognized Mr. Shaw, but did not positively recognize the other individual, although he suspected Mr. Engel based on his appearance and the fact that he was known to associate with Mr. Shaw. 3/22/06RP 13-14. Detective Johnson then asked Deputy Michaels to view the video. 3/22/06RP 15.

Detective Johnson interviewed Mr. Shaw, who confessed to the January 12 burglary and named Mr. Engel as the other suspect in that incident. 3/22/06RP 12. Detective Johnson testified Mr. Shaw later pled guilty to the other charge, and both incidents were "wrapped up into one." 3/22/06RP 32.

On March 10, 2005, Detective Johnson contacted Mr. Engel on the telephone. 3/22/06RP 16. Mr. Engel denied involvement in the January 12 burglary, but said he had done "scrapping" with Mr. Shaw a couple of months before. 3/22/06RP 16-18.

f. Testimony of King County Prosecutor Paralegal Pete DeSanto. Mr. DeSanto testified after Mr. Shaw, on the same day. The day before, he showed Mr. Shaw the video of the January 12 incident. 3/22/06RP 41. Mr. Shaw identified the two men in the video as Mr. Engel and himself. 3/22/06RP 41.

D. ARGUMENT.

1. THE COURT IMPROPERLY ADMITTED UNCROSS-EXAMINED HEARSAY TESTIMONY, IN VIOLATION OF MR. ENGEL'S RIGHTS TO CONFRONTATION AND TO A FAIR TRIAL.

a. The confrontation clause prohibits admission of uncross-examined statements by absent declarants when those statements are "testimonial" in nature. In no uncertain terms, an accused person's constitutional right to confront witnesses against him requires actual confrontation and cross-examination for the prosecution to introduce any out-of-court statements that are

"testimonial" in nature. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004). The Sixth Amendment grants a defendant the right "to be confronted with witnesses against him."[1] Likewise, the Washington constitution guarantees an accused the right "to meet the witnesses against him face to face." Wash. Const. Art. 1, § 22.[2]

In Crawford, the Court reasoned that the Sixth Amendment requires not that evidence be reliable, but that it be tested "in the crucible of cross-examination." Id. at 60. "Where testimonial statements are at issue, the only indicium of reliability sufficient to

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[1] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[2] Art. 1, § 22 provides in relevant part:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]

satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Id. at 69.

Although the Supreme Court declined to give a "comprehensive" definition of when declarants would reasonably expect their statements to be used prosecutorially, the Court did describe certain circumstances that cause statements to be testimonial. Crawford, 541 U.S. at 68. The open "[i]nvolvement of government officers in the production of testimony with an eye toward trial" renders out-of-court statements testimonial. Id. at 56 n.7; see also Lilly v. Virginia, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (plurality opinion) ("when the government is involved in the statements' production and when the statements describe past events," the statements "implicate the core concerns of the old *ex parte* affidavit practice"). "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Crawford, 541 U.S. at 51.

The admissibility of an out-of-court statement to a government official no longer turns on the rules of evidence. Id. at 69. No hearsay exception, even a "firmly rooted" exception, satisfies the constitutional demand of confrontation. Id. at 41, 69.

In Crawford, the Court assumed the declarant's out-of-court statement satisfied the hearsay exception of a statement "against penal interest" under ER 804(b)(3). Id. at 40. Yet the U.S. Supreme Court held that this indicium of reliability was irrelevant with respect to whether the statement's admission violated the Confrontation Clause. 124 S.Ct. at 59, 69. The Court explained that the constitutional considerations requiring testimonial statements to be subject to cross-examination in criminal cases "do[] not evaporate when testimony happens to fall within some broad, modern hearsay exception, even if that exception might be justifiable in other circumstances." Id. at 56 n.7.

In short, the only relevant questions for confrontation purposes are whether Mr. Shaw's identification of Mr. Engel in the video was "testimonial", whether he was unavailable to testify when Mr. DeSanto testified, and whether Mr. Engel's right to cross-examination has been satisfied. It is immaterial whether Mr. DeSanto's testimony was admissible through any hearsay exception.

Here, the prosecutor's paralegal, Mr. DeSanto, showed the video to Gary Shaw. 3/22/06RP 42. At that time Mr. Shaw identified the two men in the video as himself and Mr. Engel.

3/22/06RP 42-43. The prosecutor called Mr. Shaw as a witness but did not ask him any questions about the video. 3/22/06RP 2-7. Because the video was not included in the scope of direct examination, defense counsel could not cross-examine him about the video and did not attempt to do so. 3/22/06RP 35. Outside the presence of the jury, and prior to Mr. DeSanto's testimony, defense counsel objected to Mr. DeSanto's testimony on this subject as impermissible hearsay which violated Mr. Engel's right to confrontation. 3/22/06RP 34-35. The court stated that it would have allowed such cross-examination outside the scope of direct, but defense counsel did not know and indeed had no way of knowing how the court would have ruled. 3/22/06RP 36. Overruling Mr. Engel's objection, the court allowed Mr. DeSanto's testimony. 3/22/06RP 36. Mr. DeSanto then testified to Mr. Shaw's identification of the individuals in the video. 3/22/06RP 41-42. This testimony was inadmissible hearsay and violated Mr. Engel's fundamental right to confront and cross-examine his accuser.

b. Mr. DeSanto's hearsay testimony of Mr. Engel's uncross-examined statement was inadmissible.

i. Mr. Shaw's identification of Mr. Engel was a testimonial statement, requiring a right of confrontation. Mr. Shaw's identification of Mr. Engel as one of the men in the video clearly fell within the "pretrial statements that declarants would reasonably expect to be used prosecutorially," that comprise the "core class" of testimonial evidence protected by the confrontation clause. Crawford, 541 U.S. at 51. Mr. Shaw made this statement during an interview with an employee of the prosecutor's office, at a time when he had been subpoenaed to testify for the State (and in fact, compelled to testify by the issuance of a material witness warrant). There can be no doubt that the statement was testimonial.

ii. The admission of Mr. DeSanto's hearsay testimony violated the Confrontation Clause without a full and fair opportunity for cross-examination. The opportunity to cross-examine a witness, to test the witness's perception, memory and credibility, is the fundamental purpose of the constitutional right of confrontation. Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Parris, 98 Wn.2d 140, 144, 654 P.2d 77 (1982). The right of confrontation is not so hollow as to

permit prosecutors to limit the complaining witness's testimony to details unrelated to the incident itself and procure a conviction only upon out-of-court statements untested by cross-examination. State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997); see also Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968).

Cross-examination plays a central role in ascertaining the truth. Rohrich, 132 Wn.2d at 478, citing California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). The confrontation clause requires not only that the declarant appear in court, but that the defense actually have an adequate opportunity to cross-examine.

> In this context "not only [must] the declarant have been generally subject to cross-examination; he must also be subject to cross-examination concerning the out-of-court declaration."

Rohrich, 132 Wn.2d at 478, quoting United States v. West, 670 F.2d 675, 687 (7th Cir.) cert.denied by King v. United States, 457 U.S. 1124, 102 S.Ct. 2944, 73 L.Ed.2d 1340 (1982).

In Rohrich, the prosecutor called the complainant to testify at trial but asked no questions about the incident itself. 132 Wn.2d at 474. Defense counsel elected not to cross-examine the complainant. Id. The State then obtained a conviction based on

hearsay statements the complainant made to others. Id. The Supreme Court reversed the conviction based on a violation of the right to confrontation, even though the defense had an opportunity to confront the complainant at trial. Id. at 481.

The Rohrich Court criticized the State for putting the defendant in a "constitutionally impermissible catch-22." Id. at 478. The "no-win situation" for the defense was that he could either: attempt a cross-examination far exceeding the scope of the direct examination, call the child as his own witness, or waive his right of confrontation. Id. Yet the confrontation clause is not satisfied by merely giving the defense the opportunity to call the witness on direct. Id.

> The opportunity to cross-examine means more than affording the defendant the opportunity to hail the witness to court for examination. It requires the State to elicit the damaging testimony from the witness so the defendant may cross-examine if he so chooses.

Id., citing Shaw v. Collins, 5 F.3d 128, 132 n.7 (5th Cir. 1993).

Noting that when the declarant is available to testify "there is little justification for relying on the weaker version" of the evidence, the Rohrich Court held that "the constitutional preference for live testimony may be disregarded" only if the out-of-court statement is inherently more reliable or if the declarant's live testimony is

impossible. Id. at 479, citing United States v. Inadi, 475 U.S. 387, 394, 106 S.Ct. 112, 89 L.Ed.2d 390 (1986).

Here, as in Rohrich, Mr. Shaw testified but was asked no questions about his viewing of the video or his identification of the individuals therein. Mr. Engel was placed in the same "no-win" situation as the Rohrich defendant. He could gamble on a favorable ruling if he attempted to exceed the scope of direct examination, call Mr. Shaw as his own witness, or waive his right of confrontation. There can be no question that it was possible for Mr. Shaw to testify in person about his identification of Mr. Engel, since he had testified to other facts that very morning. 3/22/06RP 2-7. And there is no reason his out-of-court statement was more reliable than his live testimony would have been; his meeting with Mr. DeSanto had occurred only one day before, so his memory of Mr. Engel's appearance was as fresh on that day as it was on the day he testified. 3/22/06RP 42. In short, there was no reason to use Mr. DeSanto's testimony except to evade the constitutional requirement of confrontation.

Crawford makes plain that the touchstone for analysis of the scope of the confrontation clause bears no relationship to modern hearsay rules. Crawford, 541 U.S. at 51. Instead, it is analyzed

based on the intended scope of the confrontation clause itself. The plain language of ER 801(d)(1)(iii), stating the declarant must be "subject to cross-examination regarding the statement," makes clear that the exception was not intended to excuse confrontation. Therefore, that evidentiary rule and the case law interpreting that rule do not govern the admissibility of testimonial statements by absent declarants.

iii. Even under modern hearsay rules, Mr. DeSanto's testimony does not fall within any hearsay exception.

ER 801(d) provides:

> A statement is not hearsay if--
>
> (1) Prior statement by witness. The declarant testifies at the trial or hearing *and is subject to cross examination concerning the statement*, and the statement is ...*(iii) one of identification of a person made after perceiving the person[.]*

(Emphasis added). Here, Mr. Shaw's statement identifying Mr. Engel would fall under the "prior identification" exception only if Mr. Shaw had been subject to cross-examination on the statement. The prior identification may come through the testimony of a third person who was present when the declarant made the identification, "*as long as* the identifier testifies and is subject to cross-examination concerning the identification." 5B K. Tegland,

Wash. Prac. §801.29 at 330 (4th ed. 1999) (emphasis added); see also State v. Grover, 55 Wn. App. 923, 928-32, 780 P.2d 901 (1989), rev. denied, 114 Wn.2d 1008, 790 P.2d 167 (1990) (the witness testified reluctantly, claiming to have been intoxicated and unable to remember the events in question; the detective then recounted the witness' pretrial identification of the defendants); State v. Jenkins, 53 Wn. App. 228, 233-34, 766 P.2d 499 (1989) (the witness testified she had identified a photograph of the person she saw burglarizing the next-door apartment and described the photograph, but did not indicate which photograph she chose; the detective then testified that the witness had chosen the photograph of the defendant); United States v. Owens, 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988) (the witness, who suffered from injuries which caused memory loss, was able to identify the defendant to an FBI agent within the month after the assault but not at trial; the witness testified and was cross-examined concerning his memory, and the FBI agent testified to the prior identification). Since Mr. Engel was not given the opportunity to cross-examine Mr. Shaw concerning his identifying statement, the exception clearly does not apply. 5B K. Tegland, at 330.

Even if the exception could apply to this case, the facts contradict the underlying rationale. The rule is based in the rationale that the prior, out-of-court identification is more reliable than in-court identification because it is presumably closer in time and free from suggestion. 5B K. Tegland, at 330; State v. Bockman, 37 Wn. App. 474, 682 P.2d 925 (1984); State v. Simmons, 63 Wn.2d 17, 21, 385 P.2d 389 (1963), quoting Judy v. State, 218 Md. 168, 146 A.2d 29 (1958). That is clearly not the case here, since Mr. DeSanto testified that Mr. Shaw identified Mr. Engel only the day before both Mr. Shaw and Mr. DeSanto testified. 3/22/06RP 42. Having already been subpoenaed to testify against Mr. Engel, Mr. Shaw could not have been free from suggestion that Mr. Engel was guilty, and in one day his memory could not have become suddenly less reliable than Mr. DeSanto's hearsay testimony.

b. Reversal is required. The testimony of Mr. Shaw's identification of Mr. Engel was critical to his conviction. Although Detective Michaels also identified Mr. Engel from the video, Mr. Shaw's identification was significantly more prejudicial. It was more reliable both because Mr. Shaw admitted he was one of the men in the video, and because he implicated himself through the identification.

Thus. Mr. Engel's conviction was based on uncross-examined out-of-court statements, in violation of the Sixth Amendment and Washington Constitution, Art. 1, § 22. The violation of this critical protection of a fair trial requires reversal. Crawford, 541 U.S. at 69.

2. THE WASHINGTON CONSTITUTION MORE BROADLY PROTECTS THE RIGHT OF CONFRONTATION THAN DOES THE SIXTH AMENDMENT.

The Washington State Constitution provides criminal defendants the right to confront and cross-examine the witnesses against him. Wash. Const. Art. 1, § 22. In relevant part, Art. 1, § 22 states, ""[I]n criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face." This constitutional provision provides greater protection for the right to confrontation than does the Sixth Amendment. State v. Smith, 148 Wn.2d 122, 131, 59 P.2d 74 (2003),[3] citing State v. Foster, 135 Wn.2d 441, 473-74, 957 P.2d 712 (1998) (Alexander, C.J.,

[3] The Smith Court did not explore the protections provided by the state constitution, however, because the petitioner did not adequately brief the issue and the case was decided favorably to the petitioner on Sixth Amendment grounds. Smith, 148 Wn.2d at 131, 139-40.

concurring in part, dissenting in part); 135 Wn.2d at 481-94 (Johnson, J., dissenting).[4]

State v. Gunwall set forth six factors to guide the court in determining whether a state constitutional protection affords greater rights than a similar federal provision.[5] 106 Wn.2d 54, 720 P.2d 808 (1986). Because the Washington Supreme Court has already recognized the confrontation right guaranteed by the state constitution is broader than that guaranteed by the federal constitution, a full analysis as set for the in Gunwall is not required. See State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994). Nevertheless, the analysis demonstrates the greater state constitutional protections of the right to confrontation require that a criminal defendant may not be convicted based only upon hearsay declarations of witness who does not testify at trial.

a. The plurality opinion in *State v. Foster* illustrates why Art. 1, § 22 provides a greater confrontation right than the

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[4] In Foster, five justices agreed that the state confrontation clause is more protective than the federal confrontation clause: the one-justice concurrence/dissent and the four-justice dissent. The concurrence/dissent created a plurality that the conviction should be affirmed.

[5] The six factors are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. Gunwall, 106 Wn.2d at 61-62.

Sixth Amendment. In State v. Foster, the majority held that "*for purposes of determining whether RCW 9A.44.150 comports with the confrontation clause...* [the] state right to confrontation and [the] Sixth Amendment right to confrontation [are] identical." 135 Wn.2d at 466. However, the four-justice dissent and the one-justice concurrence/dissent agreed the provisions of Art. 1, § 22 provide a broader confrontation right than that afforded by the Sixth Amendment. Id. at 473-498.

After conducting a Gunwall analysis, Justice Johnson's dissent concluded that Art. 1, § 22 "has a different meaning than the Sixth Amendment" and the "language of the state confrontation clause is absolute and allows for no 'flexibility,' dependent upon the significant of the interest involved." Id., at 483 (Johnson, J., dissenting). Therefore, the four justices concluded, because nothing short of face-to-face confrontation will suffice, permitting a witness to testify by closed circuit television deprived the defendant of his right to confront the witness. Id. at 494 (Johnson, J. dissenting).

Justice Alexander's concurrence/dissent agreed in substantial part with Justice Johnson's Gunwall analysis, but disagreed with the ultimate conclusion that the term "face-to-face"

must be rigidly and literally defined. Id. at 474 (Alexander, J., concurring in part and dissenting in part). Opting instead for a "more flexible and enduring view," Justice Alexander found modern technological advances could provide "the functional equivalent" of the fact-to-face confrontation required by Art. 1, § 22. Id.

The principle point upon which Justice Alexander relied in rejecting a too-literal reading of "face-to-face" was, that "[n]either [the state or federal confrontation] clause has been read literally, for to do so would result in eliminating all exceptions to the hearsay rule." Foster, 135 Wn.2d at 474, citing State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), citing Ohio v. Roberts, 448 U.S. 46, 100 S.Ct. 2431, 65 L.Ed.2d 597 (1980). Justice Alexander chided the dissent for failing to recognize this implication of its decision. Id.

But in the end, it was not a literal reading of the state confrontation clause that limited the admission of the hearsay Justice Alexander sought to protect, but rather the Sixth Amendment itself. In Crawford, the United State Supreme Court overruled Ohio v. Roberts and held that the admission of any out-of-court testimonial statement violates the federal confrontation clause unless the defendant has the opportunity to cross-examine the declarant and the declarant is unavailable. 541 U.S. at 68-69.

Thus, the main support for a "more flexible and enduring" definition of "face-to-face" confrontation provided by Justice Alexander is gone.

Foster clearly addresses a different issue than the one presented in this case. In Foster, the defendant was denied face-to-face confrontation, but the witness testified via closed circuit television and he was therefore able to cross-examine the witness. Mr. Engels, in contrast, was able to physically confront and cross-examine the witness but not on the matter which was the subject of the hearsay. Furthermore, in Foster the witness was a six-year-old victim who repeatedly indicated her fear of the defendant, compelling the need for measures other than traditional face-to-face confrontation. 135 Wn.2d 448-49. Here, there was absolutely no reason offered why unconfronted testimony would be more reliable or even as reliable as live, in-court testimony. Both cases, however, involve the same constitutional protection – the right to confront witnesses. The significant difference is that in Foster the right to confront was abridged only in the physical sense, while in the case at bar it was abridged completely and without any rationale.

b. The *Gunwall* factors demonstrate Washington's Constitution provides a right to "face to face" confrontation that was violated by Mr. Engel's conviction based upon hearsay statements of an available but non-testifying witness. A review of the six Gunwall factors demonstrates that the Washington Constitution provides different and broader protection of the right to confront witnesses than does the Sixth Amendment.

i. Factor One – Textual Language of the Washington Constitution. The text of Art. 1, § 22 demonstrates the drafters intended the right to confrontation to be different than that of the existing Sixth Amendment. While the Sixth Amendment provides a criminal defendant the right "to be confronted by the witnesses against him," Art. 1, § 22 speaks of "the right . . . to meet the witnesses against him face to face." U.S. Const. amend. 6; Wash. Const. Art. 1 § 22.

Washington's Art. 1, § 22 is modeled after the Oregon and Indiana Constitutions. Foster, 135 Wn.2d at 460, 488, citing Journal of the Washington State Constitutional Convention, 1889, at 511 n.37. (Beverly P. Rosenow ed., 1962). In reviewing its state confrontation clause, the Indiana Supreme Court looked to the

current and historical meaning of the term "face to face."[6] Brady v. State, 575 N.E.2d 981, 987 (Ind. 1991). The Indiana court noted that the term is an adverbial phrase modifying "to meet" and thus describes how an Indiana criminal defendant and the State's witnesses are to meet. In the first standard English language dictionary, appearing in 1755, the term "face to face" means "without the interposition of other bodies." In a 1856 dictionary, it was defined as the "state of confrontation. The witnesses were presented face to face." Id. And in 1928, the first definition is "looking one another in the face." Id. Based upon these definitions, the Indiana Supreme Court concluded that the state constitutional provision had an unmistakable meaning that was more concrete and detailed than the Sixth Amendment. Id.

The term "face to face" in Washington's constitution also means that both parties are present in the same place. Foster, 135 Wn.2d at 483 (Johnson, J., dissenting). The language of Art. 1, § 22, and its common meaning thus support the conclusion that Washington's Constitution must be independently interpreted. Id. at 483-84.

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[6] Indiana Const. Art. 1, § 13, reads in pertinent part, "In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face. . . . "

ii. Factor Two – Significant Differences in Texts of Parallel Provisions. The textual differences between Art. 1, § 22 and the Sixth Amendment mandate an independent interpretation of the state constitutional provision. Foster, 135 Wn.2d at 484-86. The framers of the Washington Constitution were certainly aware of the federal constitution, and they specifically drafted and adopted different language. Id. at 485, citing Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984) and Lebbeus J. Knapp, The Origin of the Constitution of the State of Washington, 4 Wash. Hist. Q., No. 4, at 246 (1913). In addition, Art. 1, § 22 lists several rights not included in the Sixth Amendment, such as the right to appear in person, have a copy of the charge, testify on one's own behalf, and to appeal. Id. at 485-86. And while the Sixth Amendment does not explain how confrontation is to be achieved, Art. 1, § 22 specifies the method of confrontation – "face to face." The state constitution is thus more detailed, again demonstrating a different interpretation than that given to the Sixth Amendment. Foster, 135 Wn.2d at 486.

iii. Factor Three – State Constitutional and Common Law History. Little is known about the history of the

drafting of Art. 1, § 22. Foster, 135 Wn.2d at 722, 734-35; State v. Silva, 107 Wn.App. 605, 619, 27 P.3d 663 (2001). Logically, the framers of the Washington Constitution did not intend Art. 1, § 22 to be interpreted identically to the federal Bill of Rights, since they copied Art. 1, § 22 from a state constitution and the federal Bill of Rights did not then apply to the states. Utter, 7 U. Puget Sound L. Rev. at 496-97; Silva, 107 Wn.App. at 672-73. Oregon has independently interpreted its identical confrontation clause to require witness unavailability before hearsay may be admitted when the defendant has not had a prior opportunity to cross-examine the witness.[7] State v. Moore, 334 Or. 328, 49 P.3d 785 (2002) (retaining two-part test from Ohio v. Roberts, despite erosion of unavailability requirement in later United States Supreme Court opinions); State v. Campbell, 299 Or. 633, 706, 705 P.2d 694 (1985) (court must be satisfied of witness is not available before hearsay is admitted in criminal trial).

As early as 1902, the Washington Supreme Court explained that Art. 1, § 22 provided a criminal defendant due process, including right to meet the witnesses against him face to face and

[7] Oregon Const. Art. 1, § 11, reads in pertinent part: "In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face . . . "

cross-examine those witnesses in open court. State v. Stentz, 30 Wash. 135, 142, 70 P.241 (1902).

> Under the constitutional provisions defining the rights of accused persons, the appellant had the right, not only to be tried by an impartial jury, but to defend in person and by counsel, and to meet the witnesses against him face to face. Art. 1, § 22, Const. This means that the examination of such a witness shall be in open court, in the presence of the accused, with the right of the accused to cross-examine such witness as to facts testified to by him. . . ."

Id. Noting this language, the Foster plurality held that state constitutional and common law history require an independent interpretation of Art. 1, § 22. Foster, 135 Wn.2d at 486-93.

iv. Factor Four – Preexisting Washington Law.

The prior identification hearsay exception did not exist at the time of the passage of the Washington Constitution. The exception was first adopted in Washington in 1957. State v. Wilson, 38 Wn.2d 593, 617-18, 231 P.2d 288 (1951). Observing that "there is a marked division of authority as to the admissibility of extrajudicial identification," the Court decided to allow the evidence. Id. at 617. The Court relied on the rationale that

> identification of an accused in the courtroom (judicial identification) is of little testimonial force, as, after all that has intervened, it would seldom happen that the witness would not have come to believe in the accused's identity; and that it is entirely proper to

> corroborate the witness by proving that at a prior time, when suggestions of others could not have intervened to create a fancied recognition in the mind of the witness, he had recognized and declared the present accused to be the guilty person (an extrajudicial identification).

Id., citing 4 Wigmore, Evidence (3d ed.) 208, § 1130. This rationale does not apply here, since Mr. Engel's guilt had certainly been suggested to Mr. Shaw, since Mr. Shaw had already been subpoenaed to testify against him in this matter.

The extrajudicial identification exception was affirmed in State v. Carlson, 50 Wn.2d 220, 223, 310 P.2d 867 (1957) and State v. Simmons, 63 Wn.2d 17, 19-21, 385 P.2d 389 (1963). Again relying on the rationale that extrajudicial identification is more reliable if it is free of suggestion and closer in time to the event, the Simmons Court reviewed California, Maryland, and Second Circuit decisions, but no Washington cases predating Wilson. Id., citing People v. Slobodion, 31 Cal. 2d 555, 559-560, 191 P. 2d 1 (1948); People v. Hood, 140 Cal. App. 2d 585, 588, 295 P. 2d 525 (1956); People v. Bennett, 119 Cal. App. 2d 224, 226, 259 P. 2d 476 (1953); People v. Gould, 54 Cal. 2d 621, 626, 354 P.2d 865 (1960); Judy v. State, 218 Md. 168, 174-175, 146 A.2d 29 (1958); United States v. Forzano, 190 F. 2d 687, 689 (2d Cir. 1951).

Thus, preexisting Washington law demonstrates that a trial by hearsay would offend the framer's purpose in providing face to face confrontation for criminal defendants.

v. Factor Five – Differences in structure between the state and federal constitutions. The United States Constitution is a grant of limited power to the federal government, whereas the Washington constitution imposes limitations on the otherwise plenary power of the state. Foster, 135 Wn.2d at 458-59; Gunwall, 106 Wn.2d at 61. This factor supports an independent analysis of the confrontation clause. Id.

vi. Factor Six – Matters of particular state interest or concern. The regulation of criminal trials in Washington is a matter of particular state concern. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990); Gunwall, 106 Wn.2d at 62. This includes the protection provided to criminal defendants by the confrontation clause. Foster, 135 Wn.2d at 494.

c. Mr. Engel's state constitutional right confront the witnesses against him to "face-to-face" was violated when the court admitted Mr. DeSanto's hearsay testimony. Washington's "face to face" confrontation is necessarily different and more protective than the right to confrontation guaranteed by the Sixth Amendment. The

language of Art. 1, § 22, suggests a criminal defendant be permitted to meet a state's witness face to face and confront her.

Washington's constitutional right to a jury trial is broader than the federal constitutional right. Sofie v. Fibreboard, 112 Wn.2d 636, 647-48, 656, 771 P.2d 711 (1989); Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982). In looking at the scope of the state constitutional right to a jury trial, Washington courts look at the common law at the time of the adoption of the Washington Constitution. State v. Smith, 150 Wn.2d 135, 153, 75 P.3d 934 (2003). At the time of the passage of the Washington Constitution, courts would not have permitted Mr. Engel to be convicted based upon hearsay of extrajudicial identification.

Article 1, § 22 guarantees every criminal defendant in Washington the right to meet the witnesses against him face to face. Because Mr. Engel was not afforded the opportunity to cross-examine Mr. Shaw on this crucial subject, his right to face-to-face confrontation was violated and his conviction must be reversed.

3. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT ENGEL'S CONVICTION FOR BURGLARY IN THE SECOND DEGREE.

a. Sufficient evidence must be presented to support each element of the crime charged. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Seattle v. Gellein, 112 Wn.2d 58, 62, 768 P.2d 470 (1989). On a challenge to the sufficiency of the evidence, this Court must decide whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of second degree theft beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

When the sufficiency of the evidence is challenged, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Id.

To convict Mr. Engel of burglary in the second degree, the State was required to prove that, intended to commit a crime against a person or property therein, Mr. Engel entered or remained unlawfully in a building other than a vehicle or dwelling. RCW 9A.52.030(1). Because it did not prove that the Western Asphalt yard was a "building," the State failed to prove every element of the crime.

b. The Western Asphalt yard is not a "building" as defined by statute. "Fenced area" is included in the statutory definition of "building." RCW 9A.52.110(5). There is no statutory definition for "fenced area." "Absent a contrary legislative intent, we give a term that is not defined by statute its ordinary meaning." State v. Wentz, 149 Wn.2d 342, 352, 68 P.3d 282 (2003) (finding that ordinary meaning of "fenced area" applied to a residential backyard fully enclosed by a solid wood fence) citing Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 813, 828 P.2d 549 (1992).

Here, the jury was instructed that "building, in addition to its ordinary meaning, includes any fenced area." Instruction No. 7, CP 20. No evidence was presented that Mr. Engle entered or remained in any "building" other than the yard owned by Western

Asphalt. However, the yard is only partially fenced. 3/21/06RP 117.

The front and one side of the yard are bound by a chain-link fence, including a large gate which is locked when the business is closed. 3/21/06RP 118, 130; App. B.[8] The fence ends on the side of the property, where the business keeps stock piles of gravel and other raw materials. 3/21/06RP 118. There is no fence here because when the stockpiles are at their largest, they would encroach upon, damage, or even "destroy" the fence. 3/21/06RP 118. The size of these stock piles varies according to the season; they are smallest from January to March. 3/21/06RP 118-19. This incident occurred in January.

There is no fence on the rest of the property. Mr. Peterson testified "probably two-thirds of our property" is "encase[d]" by "high" and "sloping banks." 3/21/06RP 130. Mr. Peterson identified State's Exhibit 1 as "the back of our yard, which you can see the banks." App. A; 3/21/06RP 131. The photograph shows a large hill with a stock pile in the foreground and a steep cliff on the right side of the frame. The State presented no evidence that this hill or bank

[8] State's Exhibits 1-4, color photographs of the Western Asphalt yard, have been supplementally designated. Black and white photocopies of these exhibits are attached as Appendices A-D, respectively.

was of such a steep grade that it would be impossible, or even difficult, for the average person to walk up or down it. In fact, Mr. Peterson indicated that the Western Asphalt property would be accessible by way of this hill:

> DEFENSE COUNSEL: Do you know what's beyond that hill in the background:
> MR. PETERSON: Residences.
> DEFENSE COUNSEL: If you walk up that hill, can you see into the residential area?
> MR. PETERSON: I would assume so, yeah.

3/21/06RP 161. Apart from Ms. O'Leary's conclusory statement that the "terrain ... acts as a fence," no evidence was presented that the nature of the terrain actually would keep intruders out, or any explanation of how it would do so. 3/21/06RP 119.

Mr. Peterson identified State's Exhibit 2 as the front entrance to the Western Asphalt property, as viewed from inside the property. 3/21/06RP 131. The photograph shows the chain link fence, the gate standing open, and no fence to the left of the gate. App. B. The terrain to the left of the gate is on a gentle incline. App. B. On the inside of the gate, the road forks and leads off to the left. App. B. Mr. Peterson testified this is an "internal road" which leads only to Western Asphalt's aggregate supplier approximately 4-500 feet away. 3/21/06RP 160-61. The supplier is

a completely separate business and there is no physical boundary between the two properties. 3/21/06RP 160-61.

The ordinary meaning of "fenced area" contemplates a property enclosed by a fence. The Western Asphalt yard was not so enclosed. A definition of "fenced area" which would include partially fenced properties would clearly be unreasonable, and beg the question: how much fence must a property have before it can be considered "fenced?" This property was only one-third fenced. 3/21/06RP 130. Nor can the terrain be considered a "fence." The banks and hills in the unfenced sections of the property may have discouraged unauthorized entry, but there was no evidence that they could actually prevent it. Even if the terrain were completely unpassable, it still would not be a fence, according the ordinary and completely common-sense meaning of the word. The Western Asphalt yard is not a fenced area and therefore not covered by the statutory definition of a "building."

c. Reversal and dismissal is the appropriate remedy.

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt that Mr. Engel entered or remained in a "building," the judgment may not stand. *Id.* at 389. The State failed to prove that the Western Asphalt yard was a "fenced area,"

and therefore a "building" as defined by statute. This Court should reverse Mr. Engel's conviction and dismiss the charge against him.

4. THE COLLECTION OF A DNA SAMPLE PURSUANT TO RCW 43.43.754 VIOLATES THE FOURTH AMENDMENT AND ARTICLE 1 § 7.[9]

a. Because it is conducted solely for a normal crime function, the DNA search and seizure is an unreasonable intrusion of privacy. The collection and subsequent analysis of biological samples from an individual constitutes a search for purposes of the Fourth Amendment. Ferguson v. City of Charleston, 532 U.S. 67, 76, 121 S.Ct. 1281, 149 L.Ed. 2d 205 (2001); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); State v. Olivas, 122 Wn.2d 73, 83-84, 856 P.2d 1076 (1993).

A search is not reasonable unless it is pursuant to a judicial warrant based upon probable cause or falls within an exception to the warrant requirement. Skinner, 489 U.S. at 619 (citing Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980)). One recognized exception is the "special needs" doctrine, which provides that neither a warrant nor individualized suspicion is

[9] This court has ruled on this issue in State v. Surge, 122 Wn.App. 448, 94 P.3d 345 (2004). Since the Supreme Court has granted petition for review, 153 Wn.2d 1008, 111 P.3d 1190 (2005), Mr. Engel preserves this issue pending the Supreme Court decision.

necessary where "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." New Jersey v. T.L.O., 469 U.S. 325, 351, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

RCW 43.43.754 does not serve a "special need" beyond normal crime control activities. Where evidence is gathered pursuant to a warrantless search which is used only to facilitate future prosecution, the special needs doctrine cannot apply. In City of Indianapolis v. Edmond, the Supreme Court held the special needs doctrine does not permit suspicionless highway checkpoints where the primary purpose was narcotics interdiction. 531 U.S. 32, 42-43, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000).[10]

The purpose of RCW 43.43.754 "is explicitly for future identification and prosecution." Olivas, 122 Wn.2d at 91. Because an immediate objective of the search required by the statute is to facilitate normal law enforcement ends, the special needs doctrine cannot apply, and the search must be based on individualized suspicion. Edmond, 531 U.S. at 42-43; Ferguson, 532 U.S. at 83.

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[10] See also Ferguson, 532 U.S. at 76 (no special need existed to justify state hospital's generalized policy of testing pregnant women for drug use); Illinois v. Lidster, 540 U.S. 419, 423, 124 S.Ct. 885, 157. L.Ed.2d 843 (2004) (roadblock intended to identify potential witnesses of earlier crime, not to discover or prosecute new crimes, did serve special need).

When properly balanced, the warrantless and suspicionless intrusion of privacy occasioned by DNA analysis pursuant to RCW 43.43.754 is unreasonable.

b. The suspicionless compelled production of a convicted felon's genetic sequence violates the privacy protections of Article 1, § 7. Art. 1, § 7 "unlike any provision in the federal constitution, explicitly protects the privacy rights of Washington citizens." State v. Stroud, 106 Wn.2d at 148 (citing State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)). "It is now settled that Art. 1, § 7 is more protective that the Fourth Amendment, and a Gunwall analysis is no longer necessary." State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003), citing State v. Vreiling, 144 Wn.2d 489, 495, 28 P.3d 762 (2001); and Gunwall, 106 Wn.2d 54. Nonetheless, what follows is an analysis of the provisions of the Washington Constitution which requires the conclusion that the warrantless and suspicionless search in this case is an unconstitutional invasion of Mr. Engel's private affairs.

The warrant requirement is particularly important under the Washington Constitution "as it is the warrant which provides 'authority of law' referenced therein." State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (citing Seattle v. Mesiani, 110

Wn.2d 454, 457, 755 P.2d 775 (1988)). The State bears a heavy burden to prove the warrantless search at issue falls within an exception. See State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996); Mesiani, 110 Wn.2d at 457-58.

The sort of balancing or "totality of the circumstances" approach utilized within the Fourth Amendment discussion above, is substantially at odds with Art. 1, § 7. Again this sort of balancing is nothing more than the traditional means of determining the reasonableness of an intrusion, which is all the Fourth Amendment is concerned with. See, e.g., Brown, 443 U.S. at 51. Fourth Amendment analysis turns on the determination of whether a person has a reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 357, 19 L.Ed.2d 576, 88 S.Ct. 507 (1968).

Because of the nature of this determination, privacy expectations are diminished as people learn to live with advances in technology. State v. Myrick, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984). By contrast, Washington courts have long held the relevant question under the Washington Constitution is not one of the reasonableness of a person's expectation of privacy but simply whether her private affairs have been violated. Thus, despite advances and changes in society Art. 1, § 7 continues to protect

"those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." Myrick, 102 Wn.2d at 510-11; Jackson, 150 Wn.2d at 260.

The Washington Supreme Court has never recognized a special needs exception to Art. 1, § 7 and Washington law does not permit suspicionless searches. "In the absence of individualized suspicion of wrongdoing the search is a general search. '[W]e never authorize general exploratory searches.'" Kuehn v. Renton School District, 103 Wn.2d 594, 599, 694 P.2d 1078 (1985) (quoting State v. Helmka, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)).

Because of the preexisting law in this State and the local interest in protecting the private affairs of those in Washington, the search mandated by RCW 43.43.754 violates Art. 1, § 7. The order to give a DNA sample should be reversed.

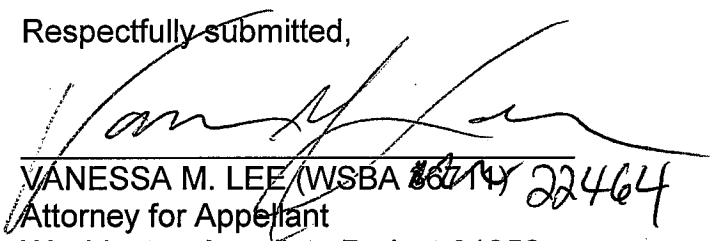
E. CONCLUSION.

Because Mr. DeSanto's inadmissible hearsay testimony was admitted in violation of Mr. Engel's constitutional right to confrontation, and because the State failed to prove every element of the crime, Mr. Engel respectfully requests that his conviction be

reversed. In the alternative, because the DNA searches mandated by RCW 43.43.754 violated both the Fourth Amendment and Art. 1, § 7 Mr. Engel respectfully requests that the order to provide a biological sample be stricken.

DATED this 12th day of October, 2006

Respectfully submitted,

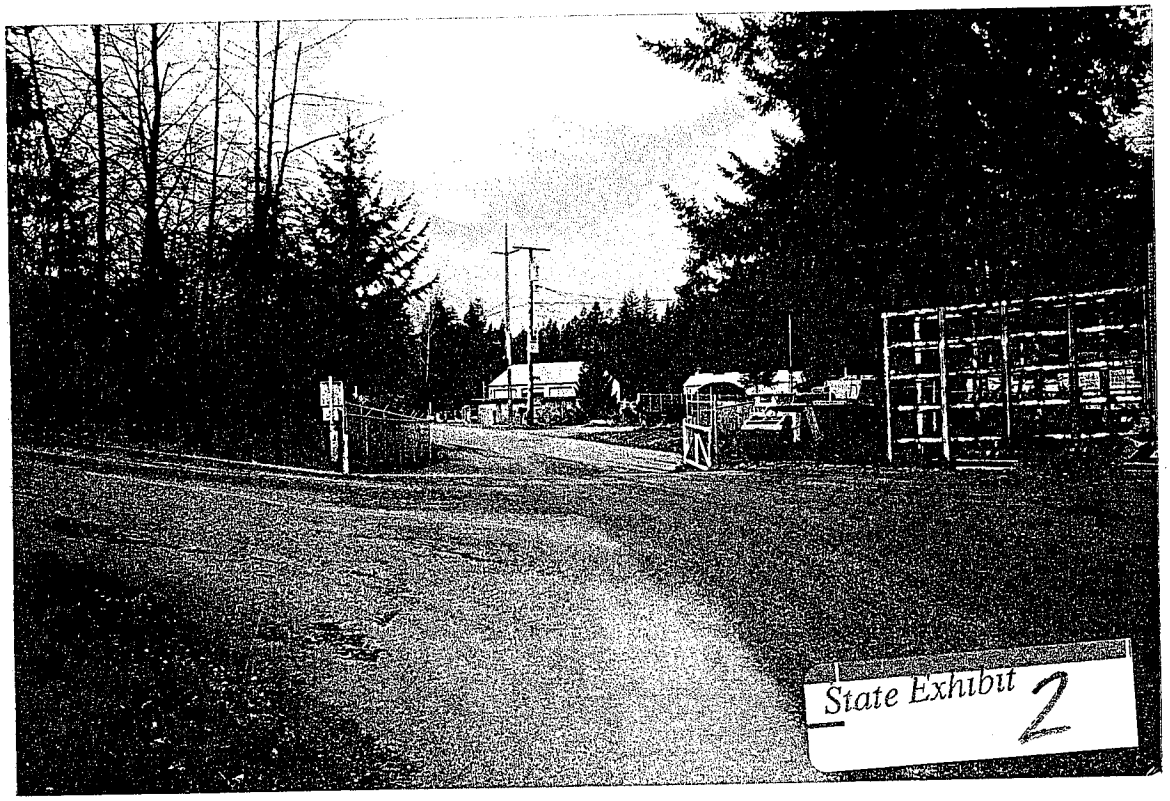


VANESSA M. LEE (WSBA ~~36714~~ 22464)
Attorney for Appellant
Washington Appellate Project-91052

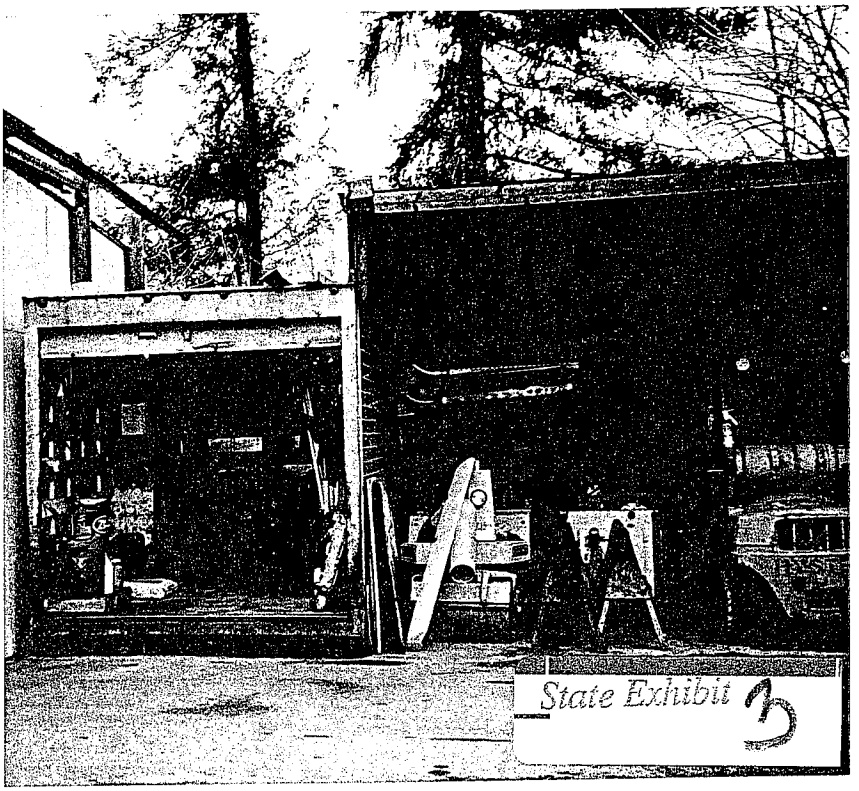
APPENDIX A


State Exhibit
1

APPENDIX B


State Exhibit 2

APPENDIX C


State Exhibit
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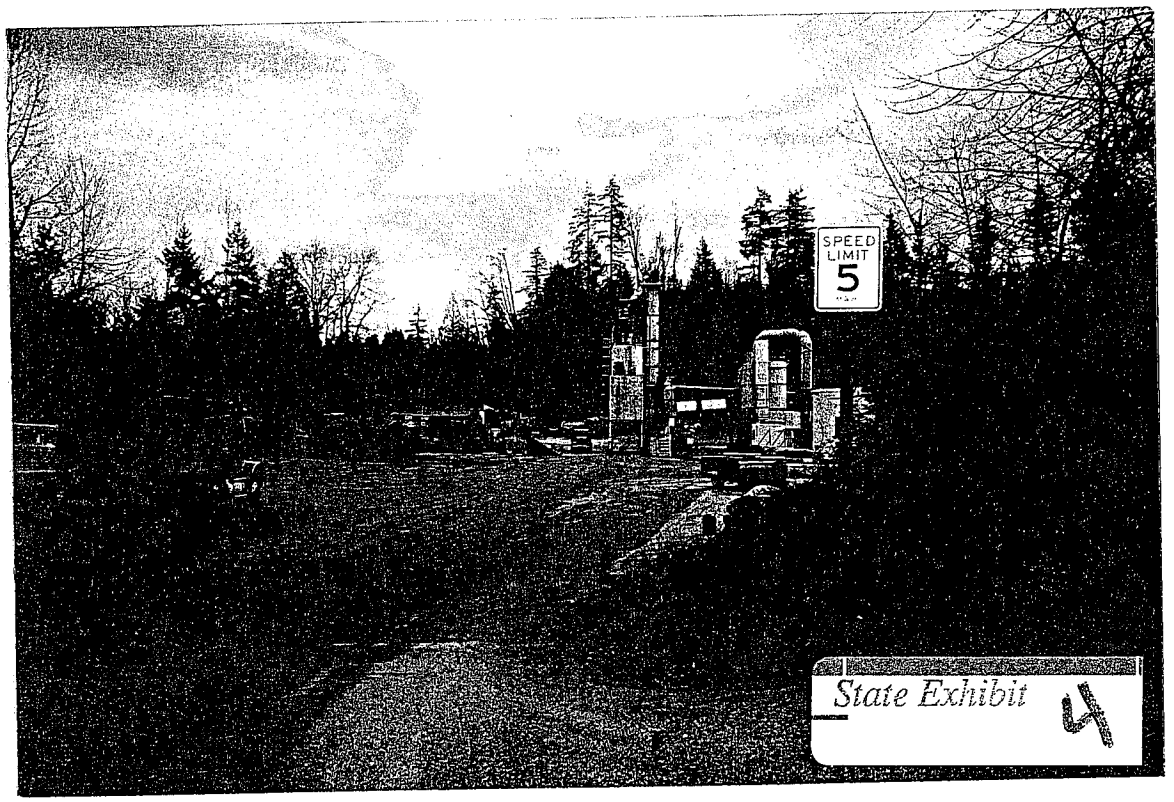
APPENDIX D


SPEED
LIMIT
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State Exhibit
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. ROGER ENGEL, Appellant.	)))))))))	NO. 58176-7-I

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 12TH DAY OF OCTOBER, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] ROGER ENGEL 3606 KENT-KANGLEY RD RAVENSDALE, WA 98051	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF OCTOBER, 2006.

X_____

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